

Apologies in medicine: Legal protection is not enough

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There has been an important shift toward openness regarding adverse events and their communication to patients. Recent research suggests that saying sorry is a key element of successful disclosure practice. However, fear of legal action has been identified as a major barrier to issuing an apology in the case of error. With the enactment of the Northwest Territories' Apology Act on Nov. 1, 2013, 8 of 10 provinces and 2 of 3 territories now have legislation that prevents apologies from being taken into account in any determination of fault or liability, and from voiding, impairing or otherwise affecting liability insurance coverage. It remains to be seen whether these laws will achieve their goals of encouraging apologies and open communication and reducing litigation. We are skeptical that apology legislation will lead to substantial improvements in patients' experiences following an adverse event. Disclosing, and apologizing for, an adverse event is one of the most complex and difficult conversations to have in health care. Therefore, without good training and support in this process, apology legislation is unlikely to have much of an impact on the behaviour of health care staff.

The disclosure of adverse events

Although unfortunate, the reality of health care is that clinical outcomes are not always optimal, which can lead to patients being harmed. The most common source of harm is the patient's

underlying medical condition.¹ However, harm can also result from an adverse event: "an event which results in unintended harm to the patient, and is related to the care and/or services provided to the patient, rather than to the patient's underlying medical condition."²

In recent decades, the traditional customs of secrecy and denial regarding adverse events have been replaced with a new ethic of transparency, particularly concerning disclosing adverse events to patients. Canada has been one of the leaders in an international shift toward openness. Indeed, one of the first places that articulated the practice of maintaining "a humanistic, care-giving attitude with those who had been harmed, rather than respond[ing] in a defensive and adversarial manner" was the Royal Victoria Hospital in Montréal.³

Health care providers in Canada are now considered to have an ethical, professional and legal obligation to disclose adverse events.¹ Since 2004, the Canadian Medical Association's Code of Ethics has specified that physicians should "[t]ake all reasonable steps to prevent harm to patients; should harm occur, disclose it to the patient."⁴ The majority of provincial medical colleges have incorporated this provision into their codes of ethics or have implemented specific disclosure policies.⁵ Legislation mandating disclosure has also been enacted in Quebec (in 2002) and Manitoba (in 2005).^{6,7} However, disclosure will likely be seen as a legal professional obligation even in provinces or territories without such legislation,¹ because physicians are seen to have a common-law duty to disclose adverse events to patients.⁸ Guidance for Canadian health care organizations and professionals regarding disclosure was also published in 2008 by the Canadian Patient Safety Institute² and the Canadian Medical Protective Association (CMPA).¹

Apologies and disclosure

The act of apologizing carries great meaning in wider society as a means of "responding to the harmed person's need for recognition, offering the individual or organisation the opportunity to make amends, [and] laying the foundation for a better relationship between both parties."⁹ A full apology is typically considered in the literature

KEY POINTS

- Recent research suggests that saying sorry is a key element of successful disclosure, but there is often a reluctance to apologize after an adverse event because of fear of legal action.
- Apology legislation has been widely enacted in Canada to prevent an apology from being taken into account in any determination of fault or liability, and from voiding, impairing or otherwise affecting liability insurance coverage.
- It remains to be seen whether these laws will achieve their goals of encouraging apologies and open communication and reducing litigation, and anecdotal evidence suggests that they are not yet having the desired effect.
- Because disclosing, and apologizing for, an adverse event is one of the most complex and difficult conversations in health care, ensuring that staff receive good training and support in relation to this process will likely be more important than legislation in improving the delivery of apologies.

to include an acknowledgement of the harm caused, an expression of remorse or regret and an acceptance of responsibility.¹⁰

Available guidance cites research indicating that a full and sincere apology following an adverse event is a key element of successful disclosure.⁹ In Canada, the CMPA recommends that: “At the post-analysis disclosure stage, after the analysis of the adverse event is complete and it is clear that a health care provider or health care organization is responsible for or has contributed to the harm from an adverse event, it is appropriate to acknowledge that responsibility and to apologize.”¹¹

An Australian report stated that, for patients, an apology is the most valued part of open disclosure and fundamental in the reconciliation process,⁹ and many believe that a full apology can assist the recovery of harmed patients, promote forgiveness and the early resolution of disputes, and reduce litigation and legal costs.^{9,11} However, it remains unclear what the overall impact of widespread disclosure and apology practices would be on malpractice litigation. Although the experiences of individual hospitals, such as the well-known examples of the VA Medical Center in Lexington, Kentucky, and the University of Michigan, suggest that disclosure and apology initiatives may in fact markedly reduce litigation,^{12,13} some researchers have referred to “the great unlitigated reservoir” and have warned that such practices may actually increase lawsuits and costs substantially.¹⁴

Traditionally, individuals and organizations have been reluctant to offer apologies in health care settings after things go wrong, and in many cases, lawyers advise against making an apology.⁵ In Canada, apologies have been considered risky for two main reasons: first, the risk that an apology would be seen as an admission of fault or liability, and second, the risk that an apology would void liability insurance coverage.¹⁵ Nevertheless, it is widely agreed that disclosing adverse events and apologizing to harmed patients is the ethical thing to do, regardless of whether it decreases or increases rates of litigation.¹⁶

Apology legalization in Canada

Apology legislation in Canada, either as a stand-alone Apology Act or an amendment to other legislation, has its origins in a discussion paper published by the Ministry of the Attorney General of British Columbia in January 2006.¹⁷ The discussion paper proposed legislation that would prevent liability being based on an apology and identified three factors in support of such reform: to avoid litigation and encourage the early and

cost-effective resolution of disputes; to encourage natural, open and direct dialogue between people after injuries; and to encourage people to engage in the moral and humane act of apologizing after they have injured another and to take responsibility for their actions. This proposal received wide support, and the British Columbia Apology Act (Box 1) was quickly introduced and passed, receiving Royal Assent on May 18, 2006.

When applied in the clinical setting, the Act prevents apologies provided by clinicians to patients and families following an adverse event from being taken into account in any determination of fault or liability, and from voiding, impairing or otherwise affecting liability insurance coverage. Because the definition of “apology” includes “words or actions [that may] admit or imply an admission of fault,” the Act not only protects clinicians’ statements of sympathy or regret (“I am sorry this happened to you”) but also statements of fault (“We made a mistake, and we regret the suffering it has caused you. We are sorry”).

The Uniform Law Conference of Canada and the Canadian Patient Safety Institute have both encouraged all provinces and territories to enact apology legislation.¹⁸ Using essentially the same terminology and structure as the British Columbia Act, apology legislation has since been enacted in Saskatchewan (amendment to the Evidence Act 2007), Manitoba (Apology Act

Box 1: British Columbia Apology Act 2006

Definitions

1. In this Act:

“apology” means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.

“court” includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2(1) An apology made by or on behalf of a person in connection with any matter

- (a) does not constitute an express or implied admission of fault or liability by the person in connection with that matter,
- (b) does not constitute an acknowledgement of liability in relation to that matter for the purposes of section 24 of the Limitation Act,
- (c) does not, despite any wording to the contrary in any contract of insurance and despite any other enactment, void, impair or otherwise affect any insurance coverage that is available, or that would, but for the apology, be available, to the person in connection with that matter, and
- (d) must not be taken into account in any determination of fault or liability in connection with that matter.

2(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in any court as evidence of the fault or liability of the person in connection with that matter.

2007), Alberta (amendment to the Evidence Act 2008), Nova Scotia (Apology Act 2008), Ontario (Apology Act 2009), Newfoundland and Labrador (Apology Act 2009), Nunavut (Apology Act 2010), Prince Edward Island (amendment to the Health Services Act 2009, and thus limited to the health sector) and most recently the Northwest Territories (Apology Act 2013). The protection provided extends “both to legal proceedings before courts and proceedings before tribunals or quasi-judicial bodies, such as regulatory authority (College) disciplinary committees or coroners’ inquests.”¹⁸ Only the provinces of Quebec and New Brunswick, and the Yukon territory do not have apology legislation.

British Columbia’s legislation used the Australian state of New South Wales’ Civil Liability Act 2002 as a model in protecting both expressions of sympathy or regret and admissions of fault.¹⁷ However, most apology legislation that has been enacted internationally — 29 of 36 laws in the United States and 6 of 8 laws in Australia — protects only expressions of sympathy or regret.^{19,20}

Will the legislation achieve its aims?

We know that honesty, transparency and apology are essential to rebuild broken trust in the doctor–patient relationship.²¹ Although apology legislation has been proposed as a means of improving patient care after an adverse event, these laws have been in place in Canada for too short a time to make a fair or accurate assessment of what effect they will have and if they will achieve their goals of encouraging apologies and open communication and reducing litigation. Indeed, legislation protecting apologies from being used as evidence of negligence has been in place in some US states since 1986,²² and it remains unclear what impact these laws are having there because key data are seldom systematically collected.²³

Anecdotal evidence suggests that apology laws are not yet having the desired effect in Canada. In an article in *The Lawyers Weekly* on Mar. 9, 2012, it was reported that, even with the enactment of apology legislation, most counsel were still reluctant to encourage their clients to make apologies. One was quoted as stating “... [i]f I’m not sure that my client can avoid a lawsuit by apologizing, I will have trouble recommending an apology as a litigation strategy.” Indeed, it was noted that “the legislation is almost incognito. Most counsel have never heard of it or have never peeked into it.”²⁴

Although apology legislation has been politically attractive in Canada, the legislation may actually be unnecessary from a legal standpoint.

It is true that, in the absence of such legislation, an apology can be admitted as evidence in court, but Canadian legal scholars have noted that this is not as dangerous as widely assumed, particularly in the medical context.^{25,26} As Bailey and colleagues noted in their 2007 critique of Canadian apology laws:

[I]t appears unlikely that a Canadian court would find a defendant negligent merely on the basis of an apology, even where the apology was an admission of fault... [A] doctor may admit to having made an error but whether that error was negligent will be determined by whether the physician “exercised the skill, knowledge and judgment of the normal prudent practitioner of the same experience and standing.” This determination is made in large part on the basis of expert evidence. As a result, we would argue that the fear of an apology being used to establish liability is largely unfounded. As far as the authors are aware, apologies on their own even where accompanied by an admission of fault, have not led to a finding of legal liability in Canada.²⁵

Although apology legislation may be well-intentioned and here to stay, we are skeptical that these laws will lead to much improvement of the way patients and families experience medical error. We believe that the laws falsely assume that this is primarily a legal matter rather than one grounded in human relationships. Disclosing, and apologizing for, an adverse event is one of the most complex and difficult conversations that occur in health care.²¹ Legal fears may surely be a factor in clinicians’ reluctance to apologize, and to disclose adverse events in general. However, the underlying reasons are usually more complex, including a professional and organizational culture of secrecy and blame, professionals lacking confidence in their communication skills, and the shame and humiliation associated with acknowledging a mistake that caused harm — to oneself, one’s patient and one’s peers.²⁷ Indeed, research published in 2006 involving US and Canadian physicians suggested that the legal environment may have a more limited impact on physicians’ communication attitudes and practices regarding adverse events than often believed, and that the culture of medicine itself may be a more important barrier.²⁸

What is the solution?

For apology legislation to make a difference to the manner and the frequency with which apologies are delivered after an adverse event, we believe that hospitals must improve the training and support that health care staff receive in relation to this process. In the United States, the National Quality Forum has endorsed a safe-practice guideline for

disclosure. It recommends, among other things, that hospitals establish a disclosure support system, provide background disclosure education, ensure that disclosure coaching is available at all times, and provide emotional support for health care workers, administrators, patients and families as part of the process.²⁹ Although the Canadian Patient Safety Institute has recognized the importance of disclosure education and training,² the focus moving forward should be on ensuring that all Canadian hospitals are adequately training and supporting staff in relation to these difficult conversations. We believe that this would make a bigger difference than legislation on how apologies are delivered.

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